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No. 04-108

In The

Supreme Court of the United States

SUSETTE KELO, *ET AL.*,
Petitioners,

v.

CITY OF NEW LONDON, AND NEW LONDON DEVELOPMENT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF THE PETITIONERS

JOHN J. DELANEY
Of Counsel
7200 Wisconsin Ave., Ste. 800
Bethesda, MD 20814
(301) 961-5115

MARY LYNN PICKEL*
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

LAURENE K. JANIK
RALPH W. HOLMEN
National Association of REALTORS®
430 N. Michigan Ave.
Chicago, IL 60611
(312) 329-8200

Counsel for Amici
**Counsel of Record*

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INTERESTS OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the National Association of REALTORS® have received consent of the parties to file this brief as *amici curiae* in support of the Petitioners pursuant to a blanket consent issued by each party. Letters of such consent have been filed with the Clerk of the Court.[1]

NAHB is a trade association representing more than 215,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 1.77 million new housing units projected for 2004, making housing one of the largest engines of economic growth in the country.

While NAHB members include property owners and development interests, its primary goal is to preserve opportunities for housing. Affordable housing projects have proven to be helpful to support the widely-recognized public purpose of redevelopment of a blighted area or slum. Additionally, many NAHB members participate in non-blight redevelopment projects at the local level.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that their counsel authored this brief and *amici* paid for it. No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution to the preparation of the brief.

However, NAHB recognizes that housing will almost never afford a community with the economic development benefits that a commercial application will. If economic development as a sole justification for public use is decided using a rational basis test with deference to local legislative bodies, then the door is left open for local governments to abuse their eminent domain powers and take developable land from NAHB members as they could from any other property owner. Therefore, NAHB must adhere in this case to its long-standing objective to protect private property rights from abuses by local government.

The National Association of REALTORS® ("NAR") is a non-profit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such activities as safeguarding real property rights, promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, public service, and cultural diversity. Like NAHB, NAR and its members embrace a deep appreciation for the value of homeownership in American society, and the importance of safeguarding private property rights.

To the end of their respective concerns, NAHB and NAR provide this brief in support of the petitioners, homeowners, with the understanding that there must be a balance between redevelopment opportunities and protection of private property rights.

NAHB has been before this Court as *amici curiae* or "of counsel" to the land owner in a number of cases involving rights of property owners and the remedies available to them when their rights are obstructed. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

Similarly, NAR has participated as *amicus* before this Court in cases including *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995);

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[2] This Court's opinion cited the NAHB's brief. 483 U.S. at 840.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Allegheny Pittsburgh Coal Co. v. Webster County*, 485 U.S. 976 (1989); and *Preseault v. ICC*, 494 U.S. 1 (1990).

SUMMARY OF THE ARGUMENT

By deferring to a legislature for the determination of whether economic development is a valid justification for condemnation under the Fifth Amendment of the U.S. Constitution, the Connecticut Supreme Court has effectively sanctioned condemnations for *any* purpose, as long as the government can relate the proposed use to some increased tax revenue or potential job opportunities. This standard requires minimal, if any, justification by the government to the courts for its actions. As a result, local governments are at liberty to abuse the public use requirement, to the detriment of property owners, with little check on their activities.

This Court must not only reverse the lower court's decision as to the redevelopment plan of the City of New London, but also it should provide a framework for an intermediate level of scrutiny such that other courts can determine whether a condemnation involving significant private interests is appropriate, especially in cases where economic development is the sole justification for condemnation.

ARGUMENT

THERE NEED NOT BE A BRIGHT-LINE TEST FOR PUBLIC-PRIVATE TAKINGS, BUT CAREFUL JUDICIAL REVIEW OF GOVERNMENT ACTION IS CRITICAL.

It is widely recognized that state supreme courts are split on the issue of whether property may be taken for solely for economic development and there is no consistent legal standard for evaluating whether these condemnations are for a public use. *See* Pet. for Cert. at 10; and *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). In order to resolve the conflict, it is not necessary for this Court to determine that all public-private takings using an economic development justification are unconstitutional. Instead, the Court need only clarify that careful judicial review of condemnations involving significant private interests, including pure economic development situations, is appropriate such that courts will not rely merely on the stated purpose of a condemnation but rather examine all available evidence to determine whether the proposed use would in fact be for public or private purpose.

A. *Berman* and *Midkiff* represent extraordinary circumstances which are not applicable to modern economic development situations.

Two U.S. Supreme Court cases have been put forth as the most applicable to the question presented by the petitioners about whether the Fifth Amendment's public use requirement allows for condemnation solely for economic development. While the two cases may provide a historical perspective on the public use doctrine, neither of these cases is particularly instructive for the City of New London factual situation.

Berman v. Parker, 348 U.S. 26 (1954), addressed the complaint of a department store owner whose property was being condemned as part of a broad plan to rid the District of Columbia of slums. The action was pursuant to a declaration by Congress that redevelopment plans to

eliminate "substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation" are a public use because they protect the public health, safety, morals and welfare. *Id.* at 28. However, the heart of the issue was whether a viable *commercial* property rightfully could be condemned as part of the housing redevelopment plan since it did not contribute to the blight or substandard housing situation targeted by Congress.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), dealt with a land oligopoly traceable to the early high chiefs of the Hawaiian Islands. The Hawaii legislature created a plan to transfer title of real property from the few land owners to their leasing tenants in order to reduce the concentration of land ownership, which was determined to be "responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232. Landowners argued that this condemnation to effectuate the transfer from one private property owner to another private property owner was in violation of the public use clause.

i. In *Berman* and *Midkiff*, the focus of this Court shifted from the public nature of the proposed future project to the eradication of a current undesirable use.

The inclusion of the redevelopment statutes seeking to cure slums and blight conditions not only expanded the definition of public use to include "public benefit," but also shifted the thinking of the courts in how to assess that use.[3]

[3] The shift is clearly captured by the dissenting justices below. "At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as a public building. As the population grew and collective needs of our society changed, however, the takings power was construed more broadly. Government authorities condemned private properties not just for a 'public use,' but also to achieve a 'public benefit' such as the elimination of urban blight." *Kelo*, 843 A.2d at 574.

Intentionally or not, the courts in the middle of the twentieth century began to defer review of the benefit of the proposed use in favor of the eradication of the present use. In essence, courts deferred to the legislature with the understanding that any rational plan would be better than a slum.[4] Legally, it was determined that the use of eminent domain was appropriate to effectuate police powers to protect public safety, public health, morality, peace and quiet, and law and order. As a result, this Court in *Berman* held that "the legislature, not the judiciary, is the main guardian of public needs to be served by social legislation." *Berman*, 348 U.S. at 32.

Midkiff followed the *Berman* rationale and the Court deferred to the legislature when it determined that "there is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff*, 467 U.S. at 240. Again, it seems that any *rational* plan would be better than an oligopoly—"to attack certain perceived evils of concentrated property ownership" is a "classic exercise of a State's police powers." *Id.* at 241-42.

[4] Related to the case before this Court, the dissenting justices cite Connecticut General Statutes 8-124 and point out that "in redevelopment projects, it is the elimination of blight and not the development that follows that constitutes the public benefit." *Kelo*, 843 A.2d at 576.

The *Kelo* situation, as with all non-blight economic redevelopment cases, is distinctly different. The city sought to develop approximately 90 acres adjacent to both a state park and a Pfizer global research facility with commercial and residential interests with the hopes of revitalizing its downtown area. The issue at hand is not about finding a means to stamp out an existing evil or to protect the community from a current danger. Clearly, the circumvention of a market-based system of land acquisition, without a clear evil to eliminate, makes this type of condemnation particularly troublesome. The goal of the government merely is to "trade up" on a property that is already a viable part of the community.

Consequently, the *Berman* and *Midkiff* standards are inapplicable outside the scope of eradicating slums, dismantling an oligopoly or some other egregious fact pattern. Generally, the focus of the courts in public-private takings, including non-blight economic development cases, needs to be on the proposed use and whether its scope is truly public or private in nature.

ii. The two cases do not anticipate public uses being justified by local legislative bodies.

The legislative deference afforded by the Court in *Berman* and *Midkiff* does not account for the broad authority of local governments in non-blight economic development situations.

Midkiff affirmed the concept first put forth in *Berman* that some judicial deference was appropriate because the power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its

affairs – including the police power. *Berman*, 348 U.S. at 31. *Midkiff* clarified the fact that a state legislature, instead of Congress, made the public use determination does not mean that judicial deference to that legislative body is less appropriate. *Midkiff*, 467 U.S. at 244. This Court determined that state legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *Id.*

It is not clear that the decisions of local governments should be afforded the same deferential treatment as the determinations of a state legislature. In the case at hand, whether the same level of judicial deference is appropriate for the findings of the New London City Council and its development corporation is certainly a debatable question. The findings that the project "intended" to benefit the public interest rather than a private entity[5] must not be given the same deference as that accorded to the determinations of a state legislative body.

In *Fasano v. Bd. of County Comm'rs. of Washington County*, 507 P.2d 23 (Or. 1973),[6] a much heralded landmark case on the role of the court in reviewing a rezoning decision of a local legislative body, the Supreme Court of Oregon answered this question with a resounding "no." Rather, the court found that such an exercise of the police power is "an exercise of *judicial authority*," and therefore is not entitled to deferential review." *Id.* at 26, 29 (emphasis added). The court explained:

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[5] 843 A.2d at 540.

[6] *Disapproved on other grounds, Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980).

> At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local government bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. *Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life....*

Fasano, 507 P.2d at 26 (emphasis added).

A growing minority of state courts follow *Fasano*. The most recent of these is North Carolina.[7] The *Fasano* rationale merits consideration by this Court in determining

[7] *See, e.g., Devaney v. City of Burlington*, 545 S.E.2d 763 (N.C. Ct. App.), *review denied*, 550 S.E.2d 772 (N.C. 2001) (City Council proceeding on zone change application was quasi-judicial). Other state court decisions following *Fasano* include: *People ex rel. Klaeren v. Village of Lisle*, 737 N.E.2d 1099 (Ill. App. Ct. 2000), *appeal allowed*, 744 N.E.2d 289 (Ill. 2001); *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271 (Del. 1989); *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978); *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971); *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988); *Woodland Hills Conservation Ass'n, Inc. v. City of Jackson*, 443 So. 2d 1173 (Miss. 1983); *West Old Town Neighborhood Ass'n v. City of Albuquerque*, 927 P.2d 529 (N.M. Ct. App. 1996), *superseded by statute on other grounds by C.F.T. Dev., LLC v. Bd. of County Comm'rs of Torrance County*, 32 P.3d 784 (N.M. Ct. App. 2001); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972), *overruled on other grounds by Raynes v. City of Leavenworth*, 821 P.2d 1204 (Wash. 1992).

the appropriate level of review to be applied to the actions of the New London City Council and its development corporation in this case.

In economic development situations, the problems with the local nature of the decision-making process are compounded by the fact that, in many instances, public housing or blight statutes fundamentally are different from economic redevelopment statutes. The latter are usually broad and may not provide local governments with guidance as to how to accomplish the goals of the statute—leaving an inexperienced local body to interpret its power of condemnation more broadly than is appropriate. *See e.g., Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002).

iii. If the legislative deference afforded by this Court in *Berman* and *Midkiff* is extrapolated to all non-blight economic development situations like *Kelo*, then the public use clause becomes irrelevant.

In its decision below, the Connecticut Supreme Court used a subjective "intent" test in determining whether, in light of the transfer of the condemned property to as yet unknown private parties for economic development, the exercise of the eminent domain power in this case was an "unreasonable violation of the public use clause." *Kelo*, 843 A.2d at 541-42. Indeed, the majority's opinion cites approvingly the conclusion of the trial court that "the *primary motivation* for the city and its development corporation was to take advantage of Pfizer's presence, and that *the primary motivation* and effect of the development plan and its conditions was to benefit the distressed city, not Pfizer." *Id.* at 540. Accordingly, the lower court con-

cluded that the "trial court's *finding* that the takings were not *primarily intended* to benefit a private party" was not "clearly erroneous." *Id.* at 542 (emphasis added). *See also id.* at 543-44.

Coupling this subjective analysis with the most deferential standard of review (*i.e.*, the clearly erroneous standard) meant that to prevail, the condemnees had to show that there was *no evidence* in the record to support the condemnor's decision. *Kelo*, 843 A.2d at 544 (emphasis added). This virtually preordained the result. Under the extremely deferential standard of review adopted by the lower court, a condemnation would fail to promote a public purpose only if it was "primarily intended" to benefit a private party rather than "primarily intended" to benefit the public. *Id.* at 541-44. Thus, as noted by the condemnees, condemnation of private property for a private business in Connecticut is a public use "so long as the government *claims* that the purpose of the condemnation is to improve the City's tax base and to increase employment." Pet. for Cert. at 25.

The Connecticut Supreme Court characterized the "principal issue" in the condemnees' appeal as being "whether the *public use clauses of the federal* and state constitutions authorize the exercise of the eminent domain power" in the manner in which it was carried out herein. *Kelo*, 843 A.2d at 507 (emphasis in original). In so doing, it ruled that the trial court's determination that the city's legislative authority *primarily intended* a taking to benefit the public interest, rather than a private entity – *is "a question of fact* that we review pursuant to the clearly erroneous standard of review." 843 A.2d at 540 (emphasis

added).[8] However, the dissent casts serious doubt as to whether this ruling is legally correct. Relying upon respected authority, the dissent asserts that "the question of what is a public use is always one of law,"[9] or at least is a mixed question of fact and law "because the trial court's determination as to public use rests on numerous factual findings regarding the goals, motives and interests of the public officials and the private parties associated with the project." *Id.* at 595. Accordingly, as noted by the dissent, "the conclusion that the development plan was intended primarily to benefit the public, *per se*, is insufficient to justify the takings." *Id.* at 596.

Support for the dissent's position that virtually unquestioned judicial deference should *not* be given to the city government's conclusory findings and declarations of intent may be found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[10] In *Lucas*, the landowner filed suit in state court alleging that application of the state's Beachfront Management Act ("BMA") to his property constituted a taking without compensation. Significantly, as in the case at bar, one of the "findings" of

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[8] A finding of fact is clearly erroneous "when there is no evidence in the record to support it" or when it is obvious that a mistake has been made. *Id.*

[9] *Id.* at 595 (citing 2 T. Cooley, *Constitutional Limitations* 1141 (8th ed. 1927)) (Zarella, J. dissenting).

[10] In this regard, it is noteworthy that in *Midkiff*, cited extensively by the lower court, this Court stated that the "public use requirement is ... co-terminus with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Amici understand this to mean that it is subject to the same boundaries as the exercise of the police power.

the state legislature in enacting the BMA was that the local economy would benefit from "tourism industry revenue." *Lucas*, 505 U.S. at 1024, n. 11.[11] In reversing the trial court, which had found a taking and awarded compensation, the Supreme Court of South Carolina held that it was required to accept the "uncontested findings" of the South Carolina legislature that new construction in the coastal zone threatened that public resource. *Id.* at 1010. Accordingly, said the court, when a regulation respecting the use of property is designed "to prevent serious public harm," no compensation is due under the takings clause, regardless of the regulation's effect on the property's value. *Id.* This Court rejected that proposition,[12] and in so doing, took note of the fact that some of the state legislature's "findings" seemed to be "phrased in 'benefit-conferring' language instead." *Id.* at 1024, n. 11.

Of particular relevance to the case at bar, the Court further noted that if the test for required compensation was whether the legislature had recited a harm-preventing justification for its action, such a justification could be formulated in practically every case, thus amounting to "a test of whether the legislature has a stupid staff." *Id.* at n. 12. Similarly, in the instant case when non-blighted private property is condemned and then is to be transferred to as yet unknown private entities for economic development, the test for constitutionally required "public use" would not be satisfied merely by relying on the condemnor's recitations that a

[11] The South Carolina legislature also made a finding that the BMA would benefit the state's citizens by providing "a natural healthy environment" in which to spend their "leisure time." *Id.*

[12] *Id.* at 1022-23.

development plan "primarily was intended to benefit the public interest rather than private entities."[13]

To that end, the *Lucas* Court "emphasized" that to win its case on remand:

> South Carolina must do more than *proffer* the legislature's *declaration* that the uses Lucas desires are inconsistent with the public interest, or the *conclusory assertion* that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ispe dixit*, may not transform private property into public property without compensation ...."

505 U.S. at 1031 (emphasis added).

Applying the *Lucas* instruction to the case at bar suggests that even deferential review should not result in acceptance of mere proffers of declarations by the condemnor that the taking of the condemnees' properties and transferring them to private ownership will benefit the public interest rather than a private entity. *See, e.g., Kelo*, 843 A.2d at 542-43. If the abuse of discretion standard allows such a result in circumstances like these, then there is no refuge for property owners from legislatures run amuck.

B. This Court needs to review most public-private condemnations with a higher level of scrutiny.

When the range of activities proposed by the government entity is unquestionably private, a heightened scrutiny by

[13] 843 A.2d at 542-543.

this Court is imperative. To be clear, it is not NAHB's position that all condemnation actions need to be reviewed with heightened scrutiny. It is well established that those projects that will be of actual use by the community (*i.e.*, parks, roads, and schools) or are infrastructure necessities to be shared by the public at large (*i.e.*, water & sewer treatment facilities) are of public use.

However, a higher level of scrutiny should be triggered by a factual situation wherein a government is not only condemning property but also there will be a transfer of property interest such tnat a private party will maintain primary ownership, control, or jurisdiction over the property. This is not to contend that public ownership is the sole method of promoting the public purposes of community redevelopment projects. *See Berman*, 348 U.S. at 34. Simply, it would allow for a more careful review of the use to which the property will be put to determine whether the public use or purpose is primary or incidental.

The Connecticut Supreme Court contends that "a public use defies absolute definition, for it changes with varying conditions of society, new application in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation." *Kelo*, 843 A.2d at 524 (citing *Katz v. Brandon*, 245 A.2d 579 (Conn. 1968)). Additionally, this Court has offered that when dealing with what is traditionally known as the police power, "an attempt to define its reach or trace its outer limits is fruitless," for "each case must turn on its own facts." *Berman*, 348 U.S. at 32. While it is a pointless exercise to make a list of all types of potential condemnation actions and determine whether each is a public use, it is imperative

for this Court to give guidance to the lower courts for reviewing public-private condemnations so that as the meaning of public use is shaped, the courts do not render the federal Public Use Clause irrelevant. U.S. Const. amend. V.

i. The clear and convincing evidence standard of review for cases with significant private interest makes the most sense at this time in view of all of the facts and circumstances of this case.

To resolve the tension between public and private uses, this Court must consider requiring a heightened or intermediate level[14] of review to be used by the lower courts in determining whether the public use requirement has been satisfied in these circumstances.

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[14] Amici propose intermediate standards with the understanding that there are more extreme levels of scrutiny which may be applied by this Court. Of course, the most deferential would be the rational basis test or the abuse of discretion standard (also called the "clearly erroneous" standard adopted by the Connecticut Supreme Court in *Kelo*, 843 A.2d at 543.) At the other end of the spectrum, the highest standard would be strict scrutiny. Strict scrutiny requires that the government show a "compelling" government objective for transferring property from one private property owner to another. It would be most appropriate in the event this Court were to find that ownership of private property is a fundamental right. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 314 (2000). While NAHB has argued previously that the right to own property is fundamental, this Court has declined to address the matter recently. Brief for the National Association of Home Builders, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (No. 01-1269). With that acknowledgement, amici consider this argument beyond the scope of the case before the Court at this time.

The most persuasive is the "clear and convincing evidence" standard espoused by the dissent below. *Kelo*, 843 A.2d at 588. The argument is that this standard of review applies in civil cases in Connecticut to protect particularly important individual interests. *Id.* It forces the government to prove that "the evidence induces in the mind of the trier a reasonable belief that the facts asserted are *highly probably true*, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Id.* (emphasis added). The dissent cites adverse possession claims in Connecticut as a similar land use dispute to condemnation requiring clear and convincing evidence to justify the taking.

The clear and convincing evidence standard is supported by other land use cases throughout the states. For instance, the Kentucky Supreme Court in *Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), overturned a section of an economic development statute finding that "public use" and "public benefit" are not synonymous. The court in Kentucky distinguished this case from others where eminent domain was appropriate by noting that those cases contained condemnors showing blighted property or public uses by clear and convincing evidence. As another example, the Supreme Court of North Dakota in *Tibert v. City of Minto*, 679 N.W.2d 440 (N.D. 2004) recently affirmed that the dedication of an easement for a public street, precluding the former owner "from resuming his right of private property, or indeed any use inconsistent with the public use" must be proven by clear and convincing evidence. *Id.* at 445.

Property rights, whether or not fundamental, certainly should be considered important enough for the public use

clause of the Constitution to require a "highly probably true" justification for the loss of an owner's title to land.

As an alternative if the clear and convincing evidence standard is unpersuasive to this Court, then a somewhat less demanding but still intermediate standard is that of heightened reasonableness discussed and adopted by the Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Dolan*, this Court applied a heightened level of review in determining the constitutionality of certain regulatory exactions. It expressly rejected "very generalized statements as to the necessary connection" between the required exaction and a proposed development's impact as being "too lax" to protect the property owner's right to just compensation when her property is taken for "public purposes." *Id.* at 391. The Court noted that the "reasonable relationship" test approximated the federal constitutional standard, but it did not adopt this standard because it could be confused with the most deferential "rational basis" level of review. *Id.* To avoid confusion, this Court applied a new "rough proportionality" standard, and in so doing, explained:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best

> encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but *the city must make some sort of individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development.
>
> * * *
>
> *[T]he city must make some effort to quantify its findings* in support of the dedication for the pedestrian/bicycle pathway *beyond the conclusory statement* that it could offset some of the traffic demand generated.

Dolan, 512 U.S. at 391 (footnotes omitted) (emphasis added).

The key to any intermediate level of scrutiny, whether it is by clear and convincing evidence or heightened reasonableness, is the shifting of the burden of proof to the condemnor to show that the proposed use is a public one. After the condemnee has shown that there will be a transfer of property interest such that a private party will maintain primary ownership, control, or jurisdiction over the property to trigger a heightened scrutiny, a burden shift is necessary.[15] In this instance, the city and development corporation should be required to present probative evidence, including a plan explaining or "quantifying" in

[15] The dissent below points out that a shifting burden of proof is appropriate "because the taking party has greater access than the opposing party to information regarding developer interest in the properties and the progress of negotiations relating to the disposition of the properties." *Kelo*, 843 A.2d at 588.

reasonable detail how the goals of the development plan will in fact be achieved (*e.g.*, identification of redevelopers and execution of formal agreements, providing a time frame and staging plan for redevelopment, and meaningful public oversight of the private entity's financial capability and accountability to the public in its use of the condemned properties).

Providing evidence is the *least* the condemnor should do in view of all the circumstances related to public-private condemnations. For the owners of the condemned properties in the City of New London, the social costs are enormous and the stakes are far too high to risk relying upon conjecture or conclusory "declarations" regarding the condemnor's intentions that might well be *wrong*.[16] The rational basis review provided by the Connecticut Supreme Court simply does not take into account the private nature of economic development condemnations.

ii. In reviewing the evidence presented by the government, this Court should balance several factors to determine whether a taking is for a public or private use.

Amici have identified three key areas which on balance would show whether a public or private taking is occurring: government intent, project feasibility, and government

[16] At the end of the day, it is the condemnees herein who are the most at risk and who have the most to lose if the condemnor is in fact wrong. What recourse will they have after 30 years? One need only look at the Michigan Supreme Court's decisions in *Poletown* and *Hathcock* to find the likely answer. *See Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

accountability to the public. Again, following a presentation of significant private interests by the condemnee, the government should bear the burden of showing that the proposal will amount to a public use.

a. Intent of Condemnor

The first issue is the intent of the government for the condemnation to determine whether the proposed use will primarily benefit the public or a private party. As discussed *supra*, mere declarations of public purpose are inadequate and the use must be examined carefully. While this Court need not grapple with every detail of a redevelopment plan, for example, it is imperative for the Court to consider the existence of planning documents and confirm that the condemnor adequately studied the situation. Additionally, this Court may consider the timeline of development for the project, whether there is one and to note whether the condemnation itself is suspect based on the timing set out in the plan. Another instance for consideration in terms of intent may be the origination of compensation for the project. It is understood that private parties are required for many redevelopment projects and the local government capital for condemnation may be acquired through private parties, but if a private party is driving the condemnation proceedings primarily for its own use or benefit, the compensation mechanism will be worthy of a court's notice. Finally, the condemnor's intent may show through the transfer itself to the third party if significantly less than fair market value or fair rental value is included in the terms.

In the case at hand, the government may well show that the plan presented for condemnation of this property truly was intended to benefit the public through economic

development and not for the benefit of Pfizer or any other particular private entity. While intent is a crucial element in many cases, mere expressions of declarations of intent must not be the only basis of a court's examination.

For example, in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002), the development authority (after advertising its ability to condemn to entice business interests to the area) sought to condemn 148 acres adjacent to a racetrack in order to allow the racetrack owners to develop additional parking. *Id.* at 4. The condemnor argued that the taking was necessary to reduce the danger of increased traffic congestion. *Id.* at 6. The Illinois Supreme Court provided more than broad judicial review and determined that the chief reason for the condemnation was for the convenience and profit of the racetrack owners. In fact, the court considered that racetrack owners had other, though more expensive, options including building a parking deck on existing raceway property. *Id.* at 10-11. Had the court merely accepted the expressed intentions of the condemnor and relied on the findings of the local development authority, the court might not have saved the adjacent property owner from condemnation.

b. Feasibility of Proposed Development

The second area for consideration is whether the government can show that the development plan is feasible. Much backlash has occurred regarding the *Poletown* decision because the project did not produce the revenue predicted by the city.[17] While *amici* recognize that this

[17] Notwithstanding the *Hathcock* court's utter rejection of its *Poletown* decision 23 years earlier, it remains to be seen whether *Poletown's* 1,200 families, or its 100 business owners, 16 churches

Court would be wary about trying to predict the future and second-guessing monetary projections, there are basic questions to be asked of the local government to provide confidence that a project will go forward. After all, the effects of condemnation are irreversible for the property owner and the government must provide proof that it takes this responsibility seriously. To that end, it is important to determine whether the development is imminent.

For example, if after comprehensive planning and condemnation proceedings commence, developers have not been identified to develop the property according to the plan, then there should be some question as to the feasibility of the project. At the bottom line, if the real estate market does not suggest that the use will be profitable for a developer, then the required private parties will not become involved.

To satisfy these concerns, the City of New London needs to show that it has carefully studied the real estate market to make the determination that the economic development projected will occur. The city and its development corporation should have the burden of going forward with some sort of individualized determinations, based on empirical evidence rather than generalized declarations of intent, explaining *how* the professed *goals* of the development plan *will actually be achieved* and the public benefited. This is crucial in light of the acknowledged "lack of any formal commitments" from developers,[18] no

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and 278-bed hospital, destroyed by the original decision, will ever recover their properties or have any meaningful recourse. *Poletown*, 304 N.W.2d 455.

[18] 843 A.2d at 545.

signed development agreements despite "extensive negotiations,"[19] the inability of the development corporation to attract investors for several years,[20] the lack of marketing studies, evidence of favorable economic trends, or other "documentation [of the] '*present development environment*' [that would indicate] a near-term demand" for the proposed uses.[21]

c. Government Accountability to the Public

Finally, a third issue for consideration is the government's accountability to the public for a condemnation with significant private interests. To what degree does the condemnor ensure that the property will be developed according to the proposed use? In short, the condemnor should provide a guarantee that the use for which the property is condemned is the use to which it is put.

In New Jersey the highest court specifically has declined to extend a heightened scrutiny to economic development cases, however, the accountability factor proved to be of great weight in *Casino Reinvestment Authority v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law. Div. 1998). The condemnation action was to support redevelopment of a residential lot for parking for the adjacent casino. The court ultimately found that the primary interest to be served was private, but the case hinged upon the fact that there would be no control over the property by the condemning

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[19] *Id.* at 596 (Zarella, J. dissenting).

[20] *Id.* at 596-597.

[21] 843 A.2d at 590, n. 19 (emphasis in original).

authority and no assurance that the property would be developed or used as planned. *Id.* at 109.

Arguably, in the case before this Court, New London has provided little, if any, assurance that the development will occur. Although the lower court essentially parroted the generalized recitals of the condemnor's intent regarding "substantial state oversight," and concluded that "ample judicial machinery was available for enforcement of the development plan,"[22] it acknowledged that the record revealed, "no primary or secondary authorities" regarding the use of the term "reasonable assurances of future public uses."[23] Additionally, the dissent in *Kelo* points out that the statutory scheme applicable to this condemnation contains no clear description of how the economic redevelopment goals are to be accomplished and that a development plan may be abandoned within three years of it approval, such that any properties acquired thereunder may be conveyed free of the plan's restrictions if they cannot be conveyed to a private party at fair market value pursuant to the plan. *Kelo,* 843 A.2d at 580. The development corporation condemned property for this project more than six years ago but no committed redevelopers have come forward and no "formal mechanisms,"[24] or "formal commitments"[25] for achieving the goals of the development plan (such as executed development agreements), yet exist. It remains to be seen at what point the City of New London will abandon this

[22] *Id.* at 544, n. 63, 545, n. 65.

[23] *Id.* at 543.

[24] *Hathcock,* 684 N.W.2d at 784.

[25] 843 A.2d at 545.

project and attempt to sell the condemned property outright for any other private use.

A few months after the lower court's decision was issued, a searching review of this very issue was conducted by the Supreme Court of Michigan in *County of Wayne v. Hathcock,* 684 N.W.2d 765 (Mich. 2004). On a strikingly similar fact pattern to the case at hand, the Michigan Supreme Court found that the condemnor:

> intends for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy. Finally, there is nothing about the *act* of condemning defendants' properties that serves the public good in this case. The only public benefits cited by plaintiff arise after the lands are acquired by the government and put to private use. Thus, the present case is quite unlike *Slum Clearance* because there are no facts of independent public significance (such as the need to promote health and safety) that might justify the condemnation of defendants' lands.

Hathcock, 684 N.W.2d at 784 (emphasis in original).

iii. While most public-private condemnation situations require heightened scrutiny, blight and collective action cases practically may be held to a lesser standard.

While the *amici* advocate an intermediate level of judicial review for those condemnations wherein a transfer of property interest such that a private party will maintain primary ownership, control, or jurisdiction over the property, it also recognizes the impracticality of application of a heightened scrutiny by the courts in two situations. While the most common standard of review for blight cases has been abuse of discretion, a higher standard has been used by a few courts in blight situations.[26]

Amici concede that there is little need to apply a higher level of scrutiny to plans for slums or blighted areas. *Amici* do not question the case law supporting blight redevelopment from *Berman* forward and the well established deference to the state legislatures as to blight statutes. While clearly the case before this Court does not address a blighted property, it is necessary to distinguish this particular type of redevelopment statute from any other

[26] "The trend in states where many cases have reached the appellate level is that the standard of review tends to change from the more deferential standard of arbitrary and capricious behavior to the less deferential standard of clear error. In the clear error standard, 'substantial evidence,' as prescribed by statute, must be presented as evidence for the findings of the redevelopment agencies or local governments." Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Prop. & Tr. J. 389, 412 (2000).

for the judicial review of public-private takings outlined herein to be most effective.

The Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), attempted to capture this concept with its term "facts of independent significance"[27] to support selection of a particular property for condemnation. While the attempt is reasonable, relying on a legislature, especially a local one, to determine "facts of independent significance" is tantamount to endorsing creative writing to justify condemnations. This Court should narrowly limit the exception to the intermediate scrutiny level of review to cases wherein eradication of slums or blight, as defined by federal or state law, is the object.

Second, it is obvious that there are condemnations with significant private benefit, but without a particular condemnation scheme, the project would be infeasible. For example, railroad tracks inherently must run in a straight line and require easements from many adjacent property owners as part of a large plan for condemnation. The court in *Hathcock* described these cases as "public necessity of the extreme sort requir[ing] collective action."[28] *Amici* agree that it would be efficient for courts to allow legislative deference for collective actions of this sort.

[27] *Hathcock*, 684 N.W.2d at 783 (the court defined the phrase as meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement).

[28] 684 N.W.2d at 783.

Amici concede that it is conceivable that either of these situations could be stretched or abused by a local government. However, it is presupposed that the courts would maintain an abuse of discretion or clear error standard for these two exceptions such that blatant abuses would not go unchecked.

CONCLUSION

The National Association of Home Builders and the National Association of REALTORS® respectfully request that this Court reverse the ruling of the Connecticut Supreme Court and determine that legislative deference generally is not a proper standard of review for condemnations involving significant private interests, especially those with economic development as the sole justification.

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Respectfully submitted,

Mary Lynn Pickel*
National Association of
Home Builders
1201 15th Street, NW
Washington, D.C. 20005
**Counsel of Record for*
Amici Curiae

John J. Delaney
Of Counsel
7200 Wisconsin Ave., Ste. 800
Bethesda, MD 20814

Laurene K. Janik
Ralph W. Holmen
National Association of
REALTORS®
430 N. Michigan Ave.
Chicago, IL 60611